No. 96-9

(3)

Supreme Court, U.S.
FILED
AUG 5 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ARKOMA PRODUCTION COMPANY, ARKLA, INC. and ARKLA EXPLORATION COMPANY,

Conditional Cross-Petitioners,

v.

BOB KLEIN AND GENEVIEVE KLEIN, JOHN FRANK PENDERGRASS, SAM THOMPSON, MARGARET SCHAFFER, CLYMER LAW, DONNIE HALL, WAYNE FRANKLIN, GLEN MORRIS, and ROWLAND VERNON; CLASS REPRESENTATIVES,

Respondents.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Respondents are a class of royalty owners consisting of some three thousand members. This action was initially filed in the Chancery Court of Franklin County, Arkansas, but was removed to the United States District Court for the Western District of Arkansas by the Defendants. The Conditional Cross-Petitioners, for clarity referred to herein collectively as "Arkoma," prevailed in the district court after a seven day trial in March, 1991. The district court held that Arkoma had not breached the covenant implied in every oil and gas lease to market, and that the Respondents' action was barred by Arkansas' three year statute of limitations.

On appeal, the Eighth Circuit reversed the district court. *Klein v. Jones*, 980 F.2d 521 (8th Cir. 1992), hereinafter "*Klein I.*" It held explicitly that the action was not time barred, and remanded the cause for further proceedings consistent with its opinion. On remand, the district court, on motion of Arkoma, reviewed the record, determined that the issues had been fully tried, and again held in favor of Arkoma.

The Eighth Circuit again reversed, holding that the district court failed to follow the mandate from the previous appeal, and that Arkoma had indeed breached the implied covenant to market. *Klein v. Arkoma Production Co.*, 73 F.3d 779 (8th Cir. 1996), hereinafter "*Klein II.*"

After the Eighth Circuit rendered its decision in *Klein II*, the separate Defendants Jerral W. Jones and Michael V.

McCoy petitioned this Court for writ of certiorari, docketed as case number 95-1924. These Respondents have filed their brief in opposition to that petition.

Arkoma, which opposes the grant of certiorari in case number 95-1924, seeks review should the Court grant that petition. For the reasons discussed herein, Arkoma's claims are without merit, and its conditional cross-petition should be denied.

ARGUMENT

Supreme Court Rule 12.5 allows a *respondent* to file a conditional cross-petition for a writ of certiorari. Arkoma cannot reasonably be considered a respondent to the Jones and McCoy Petition in case number 95-1924. The only true respondents to the Jones and McCoy Petition are those parties which were Plaintiffs in the court below. In other words, Arkoma lost in the Eighth Circuit, and if it wished to have that decision reviewed, it was required to file a petition for writ of certiorari in a timely manner as directed by Supreme Court Rule 15.

Supreme Court Rule 12.4 provides that parties which are interested jointly in a judgment may petition separately for a writ of certiorari, or may join in one petition. There is no provision, however, allowing Arkoma, the losing party in *Klein II*, to consider itself a "respondent" in the case at bar. It is axiomatic that a "respondent," in appellate practice, is "the party against whom the appeal is taken." BLACK'S LAW DICTIONARY, 1312 (6th ed. 1990). Jones and McCoy, in case number 95-1924, petitioned for review in order to obtain relief as against the Plaintiffs,

since they prevailed on the merits in the Eighth Circuit. Jones and McCoy did not petition for relief as against Arkoma.

Arkoma contends the Plaintiffs' cause was barred by the statute of limitations. However, Arkoma's petition is directed solely at alleged errors in *Klein I* – not errors alleged in *Klein II*. The issue as to the statute of limitations was decided adversely to Arkoma in the first appeal, and thus laid to rest. This is clearly evidenced by Arkoma's quote at length from the Eighth Circuit's opinion in *Klein I*, at pages 6 and 7 of the conditional cross-petition.

Thus, since November 1992, the law of this case has been that the statute of limitations does not bar the Plaintiffs' claim. In their brief to the Eighth Circuit in *Klein II*, Arkoma made no serious effort to argue the statute of limitations question, mentioning it only in a passing reference in a footnote. It was only after Arkoma's petition for rehearing and suggestion for rehearing en banc were denied that Arkoma sought to resurrect this issue. If Arkoma intended to reverse the Eighth Circuit with respect to limitations, it should have petitioned this Court for certiorari following *Klein I*, which it did not do. To raise the issue at this late date is inappropriate, and contrary to the law of the case doctrine, which generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case. 5 Am. Jur. 2d *Appellate Review*, §605 (1995).

This Court has addressed the law of the case doctrine on numerous occasions.

> As most commonly defined, the doctrine posits that when a court decides upon a rule of law,

> that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983).

Here, there is no manifest injustice nor erroneous decision of the Eighth Circuit which should compel this Court's departure from the settled doctrine that once an appeals court has expressed its opinion on a matter at issue, its ruling (the law of the case) should be followed through subsequent proceedings.

As stated at page 4 of Arkoma's conditional cross-petition, the Eighth Circuit held that Arkoma's breach of implied duty occurred as a result of its failure to insure royalty owners received a portion of the funds paid to Jones and McCoy as consideration for the determined take or pay settlement, which is described by the Eighth Circuit as the "premium." The initial premium flowed to Jones and McCoy pursuant to a gas purchase contract with a present value in excess of $24,000,000, which was described as illusory. *Klein II*, at 786, fn. 12. It is undisputed that the first payment to Jones and McCoy of this unshared premium pursuant to the gas purchase contract was not made until sometime after February 1987, less than three years prior to the filing of this action. Therefore, even under Arkoma's theory of limitations, this action was timely filed.

Arkoma's entire petition is premised on its complaints about the Eighth Circuit's first *Klein* decision. It simply cannot reopen this case for the purpose of complaining about the first appellate decision. These issues have been fully addressed and resolved, the case is not

barred by the statute of limitations, and there is no merit in the position advanced by Arkoma here.

Arkoma now claims relief based upon the Fifth Amendment to the United States Constitution. No such claim was made below. Even in its petition for rehearing in the Eighth Circuit, Arkoma did not raise that issue. This Court has consistently held that it will not decide questions that were not raised or resolved in the lower court. *Youakim v. Miller,* 425 U.S. 231 (1976); *Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992).

Reduced to its essence, Arkoma's petition is based on asserted errors of the Eighth Circuit consisting of erroneous factual findings or the alleged misapplication of a properly stated rule of law. As Supreme Court Rule 10 makes clear, such petitions are rarely granted. There is certainly no reason to grant the conditional cross-petition to a non-respondent in this case, particularly where the alleged errors did not occur in *Klein II,* the decision from which the petitioners in Case No. 95-1924 have brought their petition, but are alleged to have occurred in *Klein I,* which was decided more than three years prior to *Klein II.*

CONCLUSION

The decision of the Eighth Circuit is fully supported by the law and the evidence, and the conditional cross-petition for certiorari should be denied.

Respectfully submitted,

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